

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. **78-1659**

ALLEN W. HAYES,  
Petitioners,

vs.

NATIONAL TRANSPORTATION SAFETY BOARD  
AND  
LANGHORNE M. BOND — ADMINISTRATOR, FEDERAL  
AVIATION ADMINISTRATION,  
Respondent.

PETITION FOR A WRIT OF CERTIORARI  
To The United States Court of Appeals for  
the District of Columbia Circuit

JOHN C. BARNEY  
BUYOCOS & BARNEY  
Attorneys for Petitioner  
P.O. Box 26 Savings Bank Bldg.  
Ithaca, New York 14850  
(607) 273-6841

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Petitioner, Allen W. Hayes, prays that a writ of certiorari issue a review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered January 26, 1979, affirming the order of the National Transportation Safety Board revoking petitioner's commercial pilot certificate, and that on hearing the judgment of revocation be reversed.

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## OPINION BELOW

The Court of Appeals issued a Per Curiam judgment without rendering an opinion.

The opinion of the National Transportation Safety Board is as yet unreported.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1979. This court has jurisdiction under 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2350 (a).

## QUESTIONS PRESENTED

1. Whether a higher standard of proof than a "preponderance of evidence" should have been applied to this license revocation proceeding.
2. Whether petitioner was denied due process of law in violation of the Fifth Amendment of the United States Constitution where the initial decision and order of the administrative law judge and the subsequent order of the National Transportation Safety Board are based upon findings of fact unsupported by the record.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### UNITED STATES CONSTITUTION — FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger;

nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 5 U.S.C. § 556 (d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title (5 U.S.C. § 557 (d)) sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal

evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

STATEMENT OF THE CASE

1. PROCEEDINGS HELD. This matter was commenced by the entry of an order by the Administrator of the Federal Aviation Administration revoking petitioner's commercial pilot certificate. Entry of this order was on May 7, 1976. Upon petitioner's appeal from that order, a hearing was held before an Administrative Law Judge (ALJ) and a Decision and Order were rendered on October 19, 1976. The findings of the ALJ were that petitioner had committed 5 of 6 violations with which he had been charged, however, the ALJ reduced the sanction imposed to a 10 month certificate suspension rather than a revocation. Both petitioner, pro se, and the FAA appealed from that order to the National Transportation Safety Board (NTSB). The NTSB issued its opinion and order affirming the finding of the ALJ and reimposing the revocation order on March 10, 1977. (EA-980) Subsequently, petitioner,



pro se, requested a stay of the revocation order pending a petition for reconsideration to the NTSB. Both the request for a stay and the petition for reconsideration were denied. (EA-1028, EA 1050). Thereafter, petitioner, again pro se, sought review of the NTSB order of revocation in the Court of Appeals for the District of Columbia Circuit pursuant to Title 49 U.S.C. § 1486 (a). Judgment affirming the NTSB order was filed, without an opinion, on January 26, 1979. Copies of the above decisions and orders are attached as Appendix A.

2. STATEMENT OF FACTS. This matter derives from an incident at the New Haven, Connecticut airport which occurred on September 22, 1975. It was alleged that petitioner, as pilot of Piper aircraft N4971J (71J) acted as pilot in command without a current pilot certificate by virtue of a prior suspension, operated his aircraft in a careless or reckless manner, failed to comply with air traffic control instructions, and operated his aircraft without receiving an appropriate clearance from the air traffic controller, all in violation of § § 61.3(a), 61.19 (f), 91.75(b), 91.87(h), and 91.9 of the Federal Aviation Regulations (The text of these regulations is omitted as they are not material to this petition).

At the hearing before the ALJ the FAA attempted to prove that petitioner was actually the pilot of

aircraft 71J. The FAA presented two witnesses on this issue. The first was Mr. Robert Sheehan, an employee of the New Haven, Connecticut airport. Mr. Sheehan testified that he had seen the pilot of aircraft 71J after its landing when he had left his office to request that the pilot not blast the airport hanger with "propwash" (turbulence created behind an aircraft as it taxis) as he taxied out of the airport. (R. 71-73). Eight days later Mr. Sheehan, at the request of the FAA and in the company of an FAA inspector named John Graham, was sent to Ithaca, New York to attempt to identify the pilot of aircraft 71J. Mr. Graham apparently had been selected to accompany Mr. Sheehan because it was believed that petitioner was that pilot and Mr. Graham had known the petitioner for approximately 30 years. Mr. Graham's role was to identify the person Mr. Sheehan might identify as the petitioner.

The transcript indicates that upon arriving at Tompkins County airport in Ithaca, New York, Mr. Sheehan and Mr. Graham viewed an aircraft with two pilots in it. Mr. Sheehan testified that he saw the same person that he had saw in New Haven in the aircraft at Ithaca, New York. (R.83) Mr. Graham testified that he saw the petitioner in the aircraft at Ithaca, New York. (R.224-25). However, both witnesses agree there were two persons in the aircraft in Ithaca, New York.

(R.-228,356) Mr. Graham specifically indicated that he did not gesture towards or point at petitioner so as to make certain an identification. (R.-228) In fact, in the testimony it appears that Mr. Sheehan identified the pilot of 71J as being the man who was seated on the right side of the aircraft (R.-130,356), while Mr. Graham positively stated that petitioner was seated on the left (R.-228).

The only other identification testimony came at the hearing before the ALJ when Mr. Sheehan was unable to select petitioner from an impromptu line-up held in the hearing room and was unable to positively select petitioner's photograph from a group of photographs presented to him. Mr. Sheehan Mr. Sheehan did indicate that he found petitioner's photograph to be the "closet resemblance" but that he "couldn't positively identify this man as being the one". (R.-162-163). Mr. Sheehan later testified that he would have chosen the man in the middle of the line-up as the pilot. Petitioner was located at one end of the line-up. (R.-843,844,849,850)

The ALJ in his decision found that petitioner was the pilot of aircraft 71J and based his findings on a "preponderance of the substantial reliable and probative evidence...." (R.-934). Specifically, the ALJ noted that Mr. Sheehan had seen the pilot of 71J at Ithaca, New York, eight days later, but he

completely ignored the balance of the testimony that failed to link petitioner to that identification and in fact tended to negate petitioner as a possibility. Nevertheless, this finding was affirmed by the NTSB. (EA-980, see Appendix A), and the Court of Appeals.

#### REASONS FOR GRANTING THE WRIT

1. The Administrative Procedure Act, 5 U.S.C. § 551-576, particularly § 556, does not specify the standard of proof to be applied in matters before the administrative agencies. Section 556 (d) simply states that an action must be supported by and be in accordance with reliable, probative and substantial evidence. (The Rules of Practice in Air Safety Proceedings, 49 C.F.R. Part 921, under which the hearing was held contain no provision relating to standard of proof). Substantial evidence in this context has been defined as such evidence as a reasonable mind might accept as adequate to support a conclusion based upon the record as a whole. Doe v. Department of Transportation, 412 F.2d 674 (8th Cir. 1969). However, the Supreme Court and the Court of Appeals for the District of Columbia Circuit have recognized that in some cases, depending upon the type of case and the sanction to be imposed, a higher standard is appropriate, that of clear and convincing evidence

(Charlton v. Federal Trade Commission, 177 U.S.App.D.C. 418, 543 F.2d 903 (1976) and Collins Securities Corporation v. Securities and Exchange Commission, 183 U.S.App.D.C. 301, 562 F.2d 820 (1977)), or even a standard of clear, unequivocal and convincing evidence (Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966)). In the present case, like those mentioned, the allegations are very grave (indeed, in this case, the same allegations can give rise to a criminal prosecution under the Federal Aviation Act of 1958, 49 U.S.C. § 1472) and the sanction involved is considerable, the permanent termination of petitioner's livelihood as a commercial air pilot. Under the circumstances presented it appears that the Court of Appeals' own standards, enunciated in Collins Securities, supra., require the higher burden of proof in commercial airman's certificate revocation cases of at least clear and convincing evidence, if not clear unequivocal and convincing evidence inasmuch as the revocation may be permanent.

It is urged that it is in the interest of the public and all parties before federal administrative agencies that standards of proof be determined for rule making and adjudicatory matters such as the case at bar before the federal administrative agencies.

2. A review of the findings and conclusions of ALJ and the NTSB in this matter indicate deviation from the legal requirements of thoroughness, care, precision and accuracy to which petitioner is entitled. Cary v. Civil Aeronautics Board, 275 F.2d 518 (1st Cir. 1960). Apparently, the ALJ and NTSB chose to deem credible certain statements of witnesses, or parts thereof, while completely ignoring contradictory statements of the same witnesses which would cast the issue into doubt. By way of example, both the ALJ and the NTSB completely ignored the fact that at the identification proceedings in Ithaca, New York, neither of the FAA witnesses distinguished between the two pilots in the airplane which was being reviewed. Notwithstanding the clear evidence in the record, both the ALJ and the NTSB found a clear identification of, always speaking in singular, the person in the plane as being the same who piloted aircraft 71J on September 22, 1975. In fact the only evidence distinguishing between the two persons in the aircraft in Ithaca, New York showed that the pilot of 71J was on the right and petitioner was on the left.

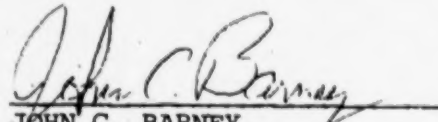
The result of the board's work in this case is to deny petitioner his right to a fair hearing and a result based upon clear and consistent findings,



supported by substantial evidence in the record considered as a whole. This is in violation of petitioners right to due process of law under the Fifth Amendment to the Constitution of the United States.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

  
JOHN C. BARNEY  
BUYUCOS & BARNEY  
Attorney for the Petitioner  
P.O. Box 26 Savings Bank Bldg.  
Ithaca, New York 14850  
(607) 273-6841

APPENDIX

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## 1 UNITED STATES OF AMERICA

## 2 NATIONAL TRANSPORTATION SAFETY BOARD

3 ----- X  
4 JOHN L. McLUCAS, ADMINISTRATOR, FEDERAL :  
5 AVIATION ADMINISTRATION, :

6 Complainant, :

7 against : Docket No.

8 ALLEN W. HAYES, : SE3284

9 Respondent. :  
10 ----- X11 Part 1 Court of Claims  
12 For Complainant: Lawrence Sullivan, Esq. State Office Building  
13 For Respondent: John C. Barney, Esq. 3338 Wash Street  
14 Syracuse, New York

15 October 19, 1976

## 16 INITIAL DECISION AND ORDER

17 JUDGE GERAGHTY: This proceeding comes before the  
18 National Transportation Safety Board pursuant to the pro-  
19 visions of the Federal Aviation Act of 1958 as amended, 49  
20 USC 1429 and the Board's Rules of Fact that is in their  
21 Safety Proceedings, 49 CFT 821.1<sup>st</sup> sequentes; on the appeal  
22 of Allen W. Hayes, hereinafter referred to as Respondent,  
23 from an Order of Revocation which seeks to revoke Respondent's  
24 Commercial Pilot Certificate No. 53040-1, with attached  
25 ratings and limitations.26 The Order of Revocation serves herein as the  
27 complaint; was filed on behalf of the Administrator of the  
28 Federal Aviation Administration through his Regional Counsel,  
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1 Mr. Lawrence C. Sullivan, Esquire.

2 After due notice to the parties, this matter came  
3 on for hearing in two separate occasions, both in Bridgeport,  
4 Connecticut and in Syracuse, New York.

5 The Respondent on both occasions was present and  
6 was represented by his attorney, Mr. John Barney, Esquire.  
7 The Administrator, herein the Complainant, was represented  
8 throughout by his attorney, Mr. Lawrence C. Sullivan, Esquire.

9 The parties and counsel were afforded full oppor-  
10 tunity to offer evidence, to call, examine and cross examine  
11 witnesses; and in addition were afforded the opportunity to  
12 argue in support of their respective positions and to pro-  
13 pose findings of fact and conclusions of law.

14 The case is before this Administrative Law Judge  
15 both for hearing and decision, and as is provided by the  
16 Rules of Practice, I have elected to issue an oral decision  
17 in the matter.

18 Discussion: The Complainant herein seeks as  
19 indicated, revocation of the Respondent's airman's certifi-  
20 cate. The Administrator bases his complaint essentially  
21 upon allegations arising out of an incident which occurred on  
22 September 22, 1975 in New Haven, Connecticut.

23 The Respondent, without detailing his contentions,  
24 and they will become apparent as I discuss the evidence,  
25 contends essentially that he was not the pilot of the aircraft

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1 involved in the incident, that even if he were that the  
2 violations alleged were in part caused by errors committed  
3 by air traffic controllers, and therefore excusable; and  
4 ultimately, that even if violations are found against him,  
5 that in light of his piloting background and history that  
6 the sanction of revocation is inappropriate.

7 In discussing the evidence I first will discuss  
8 the evidence as it pertains to the identity of the pilot  
9 since that is one of the crucial issues. I then will discuss  
10 the regulatory violations in the context of the facts of  
11 the incident itself, and lastly, sanction.

12 In discussing the evidence I will only discuss the  
13 evidence briefly. I don't intend to discuss it in excruciating  
14 detail. The parties should be aware however, that I have  
15 considered all of the testimonial and documentary evidence  
16 of record in arriving at my decision.

17 The Administrator relies upon the evidence and  
18 testimony given by Mr. Sheehan. Mr. Sheehan is in no way  
19 connected with the Federal Aviation Administration, nor is he  
20 connected with the Respondent. Rather, Mr. Sheehan is  
21 employed by New Haven Airway and was on September 22, 1975,  
22 in the performance of his duties for New Haven Airways at  
23 New Haven Airport between approximately 5:45 and 6:00 pm,  
24 local time.

25 At that time he testified he became aware of some

1 difficulty being encountered by an aircraft identified as  
2 71 Juliette, as he was listening to the radio which was  
3 located in the office of buildings occupied by New Haven  
4 Airways.

5 After hearing these communications between the  
6 tower, in which tower was apparently issuing a go around to  
7 71 Juliette, Mr. Sheehan by looking out the window saw this  
8 aircraft land and a couple of minutes later saw the aircraft  
9 pull up in front of the New Haven Airways Hangar.

10 At this point Mr. Sheehan indicated that because of  
11 the location and other occurrences where a prop blast  
12 caused some difficulty with the property there, he went out  
13 to the aircraft to talk to the pilot to apparently ask him to  
14 move the aircraft in some way so as to not cause blast damage  
15 to the hangar.

16 He stated that he went up to the aircraft, looked  
17 in the aircraft, talked to the pilot, that he was able to  
18 see the pilot, that the pilot therein was the sole occupant  
19 and that during this period of time Mr. Sheehan had a clear  
20 view of the pilot and the cockpit.

21 He was at the time of this discussion no more than  
22 10 feet from the pilot. At that point he did not know who  
23 the pilot was. He really had gone out there to discuss  
24 the positioning of the aircraft, apparently.

25 Subsequently he was contacted by personnel from FAA

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1 and was requested by them to go to Ithica to see if he could  
2 possibly affirmatively identify a particular individual that  
3 he saw in 71 Juliette on 9/22/75 in New Haven.

4 On September 30th he went to Ithica in conjunction  
5 with a Mr. Graham and a Mr. Kendall. Mr. Sheehan testified  
6 that when they arrived at Ithica after some confusion as  
7 to where Mr. Hayes particularly was that while they were  
8 standing by a fence, having been told by Mr. Graham that  
9 an aircraft was coming out in which Mr. Hayes was occupying  
10 at that time, he looked from the fence area out into an  
11 aircraft which he identified as an Aerostar and that the  
12 person who was in the Aerostar in Ithica on September 30,  
13 1975, was in fact the same individual that he had seen in  
14 New Haven, Connecticut operating or sitting in 71 Juliette in  
15 front of the New Haven Airways buildings.

16 Significantly he testified that a conversation  
17 of about 20 seconds with the pilot on 9/22/75, but during  
18 the observation of the Aerostar at Ithica, that he observed  
19 the aircraft for a good minute or two and was able to iden-  
20 tify through the windshield the individual as being the  
21 same individual he had seen on both occasions.

22 As to identifying the particular individual, that  
23 is who the individual was that he saw on September 22 and  
24 September 30, Mr. Sheehan indicated by looking at various  
25 photographs, that in his opinion at the present time, the

1 photograph identified herein as Exhibit 7A and B were the  
2 ones most close or most probable as being the same individual  
3 depicted in the photograph that he saw on September 30 and  
4 saw on September 22nd.

5 It is true that in subsequent testimony Mr. Sheehan  
6 was not able to pick the individual out of a group of indi-  
7 viduals and apparently was not able to conform his recollection  
8 as to the photographs with the individual at this time.

9 Mr. Sheehan was quite candid in indicating that  
10 during the period of time, his recollection has become hazy,  
11 and that he did not want to commit himself at this point  
12 because he was not absolutely positive as to his identification  
13 at this point in time.

14 However, he was positive in his testimony that the  
15 person that he saw on September 30 was the same individual  
16 that he saw on September 22nd, 1975.

17 Mr. Graham is employed by Federal Aviation Adminis-  
18 tration. Apparently he became involved in this incident,  
19 coincidentally when he was in an office, FAA office and  
20 heard a Mr. Kendall talking about the incident with other  
21 persons of the General Aviation District Office.

22 Mr. Graham apparently is familiar with the Respon-  
23 dent Mr. Hayes and was able, he felt, to make a positive  
24 identification of Mr. Hayes.

25 He therefore went with Mr. Sheehan and Mr. Kendall

1 to Ithica for the purpose of identifying Mr. Hayes.

2 On the way up there there was no conversation,  
3 according to Mr. Graham, concerning Mr. Hayes. When they  
4 arrived at Ithica apparently Mr. Hayes was not immediately  
5 available, however, subsequently, it was determined that  
6 Mr. Hayes was going to be coming out of what has been identi-  
7 fied as the South Hangar at Ithica, Chart Air, and that  
8 Mr. Hayes was going to be piloting or occupying one of the  
9 pilot seats in an Aerostar.

10 Mr. Graham came back and informed the parties, that  
11 is, Mr. Kendall and Mr. Sheehan, that this aircraft was  
12 coming out of the hangar.

13 At that point Mr. Graham testified that when the  
14 Aerostar did come out he was standing alongside Mr. Sheehan  
15 and Mr. Kendall and that when Mr. Sheehan saw the aircraft,  
16 Mr. Sheehan did testify and state to him at that point that  
17 the person that he saw coming out of the hangar in the  
18 Aerostar was the same person; and that the person Mr. Sheehan  
19 identified at that time was known in fact to Mr. Graham as  
20 Mr. Hayes.

21 Mr. Askew testified essentially as to the identifi-  
22 cation of various positions and tapes. However, he also  
23 testified as to a conversation that he had with Mr. Hayes  
24 in which, according to Mr. Askew, the conversation began in  
25 the third person but then went around to the first person, as



1 the conversation progressed, indicating that to him, that in  
2 Mr. Askew, that the Respondent in discussing the incident of  
3 9/22/75, came to the point in the conversation where he was  
4 discussing it as though he were the pilot.

5 It is true on cross examination he was not able to  
6 point out the specific phrase in the transcript as to where  
7 this occurred, however Mr. Askew does remember that the con-  
8 versation took place and in his statement, it appeared that  
9 the transcript was not complete as to this particular point.

10 With respect to the Respondent's case, the Respon-  
11 dent produced several witnesses this morning. All of these  
12 witnesses are employees of the Respondent.

13 The first witness was a Mr. Rogowicz. He is  
14 apparently the General Manager for Chart Air and has been that  
15 for some period of time, at least since about 1967.

16 Mr. Rogowicz testified as to the aircraft owned by  
17 Chart Air in September 1975, one of which was 4971 Juliette.  
18 The witness testified that the aircraft were operated by a  
19 number of persons, including the Respondent. That is, there  
20 were apparently at least six other pilots and also that the  
21 aircraft were rented out to student pilots or other pilots  
22 that were qualified to operate Chart Air aircraft.

23 There is testimony as to how various records were  
24 kept or not kept with respect to identifying who was in fact  
25 operating aircraft at that point. My observation of

1 Mr. Rogowicz, in this Judge's opinion, Mr. Rogowicz' testi-  
2 mony with respect to the record keeping and particularly  
3 as it appeared on September of 1975 and this particular air-  
4 craft was less than convincing.

5 Mr. Thomas testified also for the Respondent.  
6 With respect to the forms, Mr. Thomas candidly admitted that  
7 he was not that clear as to who accounted for the forms,  
8 however, he did point out that in his opinion there would be  
9 no definitive way of telling on a particular charge form  
10 who the particular pilot was.

11 However, I thought it was significant that both  
12 Mr. Rogowicz and Mr. Thomas did indicate that if the aircraft  
13 were rented out to a customer, that the customer's name  
14 would most likely appear on the form.

15 Here the Respondent has put in no objective testi-  
16 mony of any form, of any type of record to show who was  
17 operating 71 Juliette on that particular date. If it was  
18 rented by someone else, or if it was signed by someone else;  
19 we just have no evidence at all offered by the Respondent on  
20 this particular point.

21 The last witness was a Mr. Lalley who testified  
22 essentially as to observations that he made at New Haven  
23 Tower on September 15th of this year.

24 In his testimony he was able to see aircraft at  
25 least three or four miles out of New Haven.

1 not feel that the hill, which he admitted was to the northwest  
2 of the field, caused any sort of obstruction or impeded his  
3 observation of aircraft as they made their approach to  
4 runway 20.

5 The remainder of his testimony dealt with the  
6 probability or possibility of identifying someone from the  
7 fence which was approximately, in his testimony, 60 feet  
8 away; an individual standing there when an Aerostar would  
9 taxi out of the south hangar, and Mr. Lalley's testimony was  
10 that in his opinion, from his observation on numerous  
11 occasions, even where he knew who the pilot was, it was  
12 impossible for him to make identification by looking at the  
13 aircraft as it taxied out.

14 That essentially is the testimony with reference  
15 to the identification of the pilot on 9/22/1975. I also  
16 would mention here that when requested that the pilot give  
17 his name that the pilot did indicate that his name was  
18 Lawrence Sullivan. That appears in one of the exhibits.

19 I must take into account here the fact that the  
20 Respondent, on the evidence here, has had some difficulty,  
21 shall we say, with the New England Region. This is something  
22 which cannot be totally disregarded.

23 In evaluating the testimony, I have taken into  
24 account the candidness, as I apprehended it, of Mr. Sheehan  
25 in giving his testimony; the difficulty as he admitted it in

1 making a statement a year or more after the incident.

2 As balanced against his positive statements as to  
3 the identifications he did make at the particular point in  
4 time, and comparing them with the exhibits; the demeanor of  
5 the witnesses that did testify, Mr. Graham, Mr. Sheehan,  
6 Mr. Askew, Mr. Rogowicz, Mr. Lalley and Mr. Thomas, the  
7 various interests of those individuals and in balancing all  
8 of the testimony, I have on consideration of those factors  
9 and all of the evidence concluded that the elements as I  
10 have stated them warrant resolution of the issue of credi-  
11 bility on this point in favor of the Complainant, and I  
12 formally make that finding for the record.

13 I would formally conclude and state therefore, for  
14 the record, that in this Judge's opinion the record by a  
15 preponderance of the substantial reliable and probative  
16 evidence establishes that on 9/22/1975 the Respondent did  
17 operate 4971 Juliette as shown by the transcripts on the  
18 face covers thereof, although abbreviations are used later.  
19 To have operated that aircraft in an operation into New  
20 Haven Airport.

21 Turning now to the operation itself, I reject the  
22 argument that air traffic control in any way contributed to  
23 the occurrence here. The evidence does not support that.

24 The record shows that the aircraft did report in  
25 six miles out and was requested to report a down wind.

1 Miss Fields was operating in the Tower. However her direct  
2 supervisor was Mr. Morris and as you will recall, many of  
3 the transmissions that were made here, and we went through  
4 this in detail, were made not only by Miss Fields but also  
5 by Mr. Morris, her direct supervisor.

6 In any event, the aircraft was requested to  
7 report on a down wind. The evidence here does not establish  
8 that such a report was made. To the contrary, it clearly  
9 and unequivocally establishes that no such report was ever  
10 made.

11 The testimony of all the controllers, that is  
12 Miss Fields, Mr. Morris, and Mr. Robins is to the effect that  
13 no report was received from 71 Juliette until it was  
14 approximately one half mile out on final.

15 They testified that the aircraft appeared to  
16 pop out from behind a hill that was obscuring their vision.  
17 While it may be true that Mr. Lalley did not have this hill  
18 obscure his vision, there has been no evidence here which  
19 shows a similarity of circumstances between these two  
20 occasions.

21 Absence of showing total similarity, Mr. Lalley's  
22 testimony carries, in this Judge's opinion, no weight.  
23 Here, the controllers on the date in question were attempting  
24 to control several aircraft and were involved in controlling  
25 aircraft, not just observing operations. They had requested

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A. D. P. C.

1 a report on down wind. They did not receive that and it is  
2 to my thinking completely within the realm of feasibility  
3 that when the aircraft suddenly reported a half mile out  
4 that by looking out there, it appeared to them, especially  
5 since the aircraft on their testimony appeared to be quite  
6 low, that it did come out from behind the hill, or at least  
7 appeared to suddenly be there when their attention was fo-  
8 cused upon this particular aircraft.

9 At the same time the evidence from the controllers  
10 and Mr. Gray was that another aircraft, 35 Tango had been  
11 cleared for takeoff, that is to taxi into position. There  
12 is some dispute as to exactly where this aircraft was with  
13 respect to the edge of the runway.

14 On the preponderance of the evidence here and from  
15 the testimony of the controllers it does appear that this  
16 aircraft was given a clearance to take off and that because  
17 of the clearance issued to 35 Tango that the go around  
18 clearance was given to 71 Juliette because, in the Traffic  
19 Controller's opinion, apparently a conflict was in the  
20 process of occurring between the two aircraft.

21 I might just digress here to indicate that in my  
22 opinion the Air Traffic Controllers' performance of their  
23 duties on this date in question, as it is when they are con-  
24 trolling traffic at airports, is to assure, as best they can,  
25 safe clearance between the aircraft that are operating on or in

27A  
A. D. P. C.

proximity to that airport.

While it is true that the pilot has operational control of the aircraft, he must operate his aircraft in conformity with the instructions given by Air Traffic Control at the locations where Air Traffic Control jurisdiction is being utilized.

Absent an emergency, the Respondent or any pilot operating on an airport where Air Traffic Control is being exercised must operate in conformance with the instructions received from Air Traffic Control.

They are responsible for the traffic being controlled on that field or entrance to that field. That doesn't mean that you follow with blind obedience. One can question, but absent a declaration of emergency, which doesn't appear here, you are required to operate in compliance with the instructions received.

Here I find nothing that would excuse the Respondent from operating in compliance with the instructions received. He was instructed to go around and he was instructed to do this twice. I don't think the instruction to report down wind, if it stood all by itself would be that significant. What is significant in my opinion is that after having been told to go around twice the pilot decided for himself that he could land the aircraft on that runway.

After landing he was also told to turn off the run-

way. Instead of doing this he executed a 180 in direct contravention of the instruction received and taxied back down the active runway.

I feel on all of the evidence here that by a clear preponderance of the substantial liable and probative evidence that regulatory violations of Sections 91.75 (b), 91.87 (h) have been clearly established.

With respect to Section 91.9, potential endangerment is sufficient. Whether or not the aircraft wing passed over 35 Tango or passed next to 35 Tango, it is sufficient that another aircraft was cleared by Air Traffic Control.

That Air Traffic Control in their judgement in trying to assure safety of operation and clearance between aircraft operating at the airport at that time issued a go around instruction which the Respondent ignored; and ignored deliberately.

I feel the operation by the Respondent at that time was sufficiently egregious and deliberate to warrant a finding that he operated the aircraft in a potentially hazardous manner and in a reckless manner so as to potentially endanger the lives and property of others and in violation of Section 91.9 and I so hold.

With respect to the allegations of operation without possession of a certificate, the Administrator has made allegations with respect to suspension of Respondent's



certificate by referring to two separate regulatory violations which bear docket numbers 1469 and 1618 respectively.

One Order was issued by the New England Region. The other Order was an Order apparently by the New York or Eastern Region.

There is nothing in the record here to contradict the position espoused by Mr. Sullivan in his argument, that is, that the Respondent did not surrender his certificate in compliance with the Order issued by the New England Region.

I therefore find that the evidence does establish that at the time the Respondent was operating the aircraft, he was operating the aircraft at a time he did not hold a current and valid airman's certificate; because the certificate was at that point in time under an Order of suspension, which had been affirmed.

It also follows that he was operating therefore in violation of Section 61.3 (a) and 61.19 (f) <sup>IN</sup> that he did not have a valid airman's certificate and that he had failed to surrender that certificate.

With respect to sanction: Taking into account the Respondent's prior history which here I note involves violations of the same sections; that is 91.75 (b), 91.87 (h) on two occasions, that is 1969 and 1970; it does show a disregard or a tendency on the part of the Respondent not to comply at least in the area where ATC instructions are involved. I do

take into account however, that these violations are somewhat removed in time; that is 1969 and 1970.

I have balanced that and the type of suspensions that were imposed in those two cases, the nature of the violations here, Respondent's apparent long experience in aviation and his standing as testified to by his witnesses and apparently not seriously contradicted by the Complainant. I do not feel that on balance all of the evidence before me shows a sufficiently serious disregard of safety regulations so as to warrant the imposition of sanction of revocation, which is of course the ultimate sanction.

On the other hand, in light of the fact that this is a repetitive type violation, I feel that in light of the circumstances involved here in their entirety and the fact that the Respondent has apparently violated these same sections in the past that a sufficiently long period of suspension is necessary though for deterrent purposes and hopefully for educating the Respondent to the necessity of complying with Air Traffic Control instructions absent an emergency type of situation.

Therefore, I will affirm the Administrator's complaint, however I do intend to modify the complaint to provide for a period of suspension rather than revocation.

## FINDINGS OF FACTS AND CONCLUSIONS OF LAW

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On consideration of the record in its entirety, the admissions of the parties and from my observation of the witnesses and their demeanor I make the following specific findings of facts and conclusions of law:

1. The Respondent has appeal from an Order of Revocation issued on behalf of the Complainant on May 7th, 1976 which seeks to revoke Respondent's Commercial Pilot's Certificate No. 53040-41 with attached ratings and limitations.

2. The Respondent is now and at all times pertinent herein was the holder of Commercial Pilot's Certificate No. 53040-41.

3. That Respondent on September 22, 1975, acted as pilot in command of Piper Aircraft Civil Registration No. N4971J, which landed at New Haven Airport, New Haven Connecticut at approximately 1751 local time.

4. That at said time the New Haven Airport on the evidence herein had in operation an operating control tower operated by the United States.

5. That as the Respondent approached ~~New Haven~~ on this flight he contacted the control tower reporting his position as six miles east of the field.

6. Respondent as pilot in command was instructed by Air Traffic Control to report to the tower on a left down wind for runway 20. That contrary to said instruction, the

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Respondent did not report on a down wind leg but instead reported at a time when he was approximately one half mile out on final approach for runway 20.

7. That prior to the time that Respondent was advised or did advise Air Traffic Control that he was on a half mile final for runway 20, another aircraft, to wit, Cherokee N4435 Tango had been cleared for takeoff and was taxiing into position on said runway 20.

8. That on the facts and circumstances here that Air Traffic Control, upon ascertaining that the Respondent was one half mile out on final for runway 20 cancelled the takeoff clearance for November 4435 Tango and advised the Respondent in Aircraft 4971 Juliette to go around.

9. That despite the aforesaid instruction to operate 4971 Juliette in a go around, which instruction was issued more than once, the Respondent failed to comply with said Air Traffic Control instruction.

10. That subsequent to receipt of those instructions on his approach to runway 20 that the Respondent completed a landing on runway 20 without having received clearance from Air Traffic Control to land his aircraft on runway 20 at New Haven Airport.

11. That after landing upon runway 20 the Respondent was advised by the Air Traffic Control Tower to turn right off runway 20; however that contrary to said instruc-

tion the Respondent, instead of taxiing clear executed a 180 degree turn on the active runway and proceeded to taxi down said runway, turning off at taxi-way C, in violation of the instructions received by him from Air Traffic Control.

13. That the evidence of record indicates that at the time of said operation the certificate held by Respondent was under an Order of Suspension and that therefore he did not by virtue of said Order have in his possession a current and valid airman's certificate and that consequently he also at that time was in violation in that Respondent had failed to surrender his suspended airman certificate.

14. That by reason of all foregoing facts and circumstances, the Respondent is found to have operated in regulatory violation of Sections 61.3 (a), 61.19 (f), 91.75 (b), 91.87 (h) and 91.9 of the Federal Aviation Regulations.

15. That all issues of credibility as necessary in this proceeding have on the evidence and for the reasons previously discussed herein been resolved in favor of the Complainant.

16. That safety in air commerce or air transportation and the public interest do not require the affirmation of the Administrator's order of revocation as issued, rather that it should be modified as hereinafter set forth.

## ORDER

IT IS THEREFORE ADJUDGED AND ORDERED:

1. That the Administrator's Order of Revocation be and the same hereby is modified to provide for a suspension of 10 months instead of revocation.

2. That Respondent's Airman's Certificate No. 53040-41 with attached ratings and limitations be and the same hereby is suspended effective 11 days from this date, such suspension to continue thereafter for a period of 10 months, after such Certificate shall have been physically surrendered to the Regional Council of the New England Region of the Federal Aviation Administration or other authorized representative of the Federal Aviation Administration.

3. That the Certificate shall be surrendered by depositing it in the United States Mail, postage prepaid and properly addressed to the proper official of the Federal Aviation Administration or by personal delivery to such individual.

4. If the Respondent surrenders his Certificate prior to the effective date of this Order the period of suspension shall commence on the date of the actual surrender and continue thereafter for the period specified herein.

However, if the Respondent fails to surrender his Certificate on or before the effective date of this Order the suspension shall continue in effect until the Certificate has

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1 been physically surrendered and has been in the possession  
2 of the Federal Aviation Administration for a period of 10  
3 months.

#### 4 APPEAL

5 Either party to this proceeding may appeal this  
6 Initial Decision and Order. The Appellant shall file his  
7 notice of appeal within 10 days after service upon him of  
8 this decision and must within 40 days after service upon  
9 him of this decision file a brief in which are set forth  
10 his objections to this Initial Decision and Order.

11 A notice of appeal and brief shall be filed with  
12 the National Transportation Safety Board, Docket Section,  
13 800 Independence Avenue, SW, Washington, D.C., 20594.

14 No appeal to the Board from either party is  
15 received within the time allowed or the Board does not on  
16 its own motion review this Initial Decision, the Decision  
17 and Order shall become final.

18 The timely filing of an appeal shall however stay  
19 the Order contained in this Initial Decision.

20  
21 *Patrick G. Geraghty*  
22 *Administrative Law Judge*  
23 *10 November 1976*  
24  
25

Appen. 1

(R1043)

SERVED: March 31, 1977

NTSB Order No. RA-980

## UNITED STATES OF AMERICA NATIONAL TRANSPORTATION SAFETY BOARD WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 10th day of March 1977.

JOHN L. McLUCAS, Administrator,  
Federal Aviation Administration,

Complainant,

v.

ALLEN W. HAYES,

Respondent.

Docket SE-3284

#### OPINION AND ORDER

Both respondent and the Administrator have appealed from the  
initial decision of Administrative Law Judge Patrick G. Geraghty, issued  
orally on October 19, 1976, at the conclusion of the hearing which was  
held in this proceeding on August 11 and 12, and October 19, 1976.<sup>1/</sup> The  
law judge therein made the following findings:

1. Respondent, on September 22, 1975, acted as pilot-in-command  
of Piper Aircraft N4971J, which landed at New Haven Airport, New Haven,  
Connecticut, at approximately 1751 local time.

<sup>1/</sup> An excerpt from the hearing transcript containing the initial decision  
is attached.

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2. At said time, the New Haven Airport had in operation an operating control tower operated by the United States.

3. As respondent approached the airport on this flight, he contacted the control tower, reporting his position as 6 miles east of the field.

4. Respondent was instructed by Air Traffic Control (ATC) to report to the tower on a left down wind for Runway 20. Contrary to said instruction, respondent did not report on a down wind leg, but instead reported at a time when he was approximately 1/2 mile out on final approach for Runway 20.

5. Prior to the time that respondent advised ATC that he was on a 1/2 mile final for Runway 20, another aircraft, Cherokee N4435 Tango, had been cleared for takeoff and was taxiing into position on Runway 20.

6. ATC, upon ascertaining that respondent was 1/2 mile out on final for Runway 20, cancelled the takeoff clearance for November 4435 Tango and advised respondent in Aircraft 4971 Juliette to go around.

7. Despite the aforesaid instruction to go around, which instruction was issued more than once, respondent failed to comply therewith.

8. Subsequent to receipt of those instructions on his approach to Runway 20, respondent completed a landing on Runway 20 without having received clearance from ATC to land his aircraft.

9. After landing upon Runway 20, respondent was advised by the tower to turn right off Runway 20; however, contrary to said instruction, respondent, instead of taxiing clear, executed a 180° turn on the active runway and proceeded to taxi down said runway, turning off at taxiway C, in violation of the instructions received by him from ATC.

10. The evidence of record indicates that at the time of said operation the certificate held by respondent was under an Order of Suspension; that therefore he did not, by virtue of said Order, have in his possession a current and valid airman's certificate; and that he also at that time had failed to surrender his suspended airman certificate.

The law judge further found that, by reason of all the foregoing facts and circumstances, respondent violated sections 61.3(a), <sup>2/</sup> 61.19(f). <sup>3/</sup>

2/ Section 61.3(a) provides, in pertinent part, as follows:  
"§61.3 Requirement for certificates, rating, and  
authorizations.

(a) Pilot certificate. No person may act as pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of United States registry unless he has in his personal possession a current pilot certificate issued to him under this part. However, when the aircraft is operated within a foreign country a current pilot license issued by the country in which the aircraft is operated may be used."

3/ Section 61.19(f) provides, in pertinent part, as follows:  
"§61.19 Duration of pilot and flight instructor certificates.

(f) Return of certificate. The holder of any certificate issued under this part that is suspended or revoked shall, upon the Administrator's request, return it to the Administrator."

4/ 91.75(b), 5/ 91.87(h), and 6/ 91.9 of the Federal Aviation Regulations (FAR). The law judge concluded that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order of revocation, and he thereupon modified said order to provide for a 10-month suspension of respondent's commercial pilot certificate.

Respondent, in his appeal brief, argues that the Administrator's manner of identifying respondent as the pilot of N4971J during the subject incident was faulty in a number of respects; and that, regardless of the identify of the pilot of that aircraft, no sanction is warranted since (a) the pilot is the final authority as to the operation of his aircraft, (b) a

4/ Section 91.75(b) provides, in pertinent part, as follows:  
 "§ 91.75(b) Compliance with ATC clearances and instructions.

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction."

5/ Section 91.87(h) provides, in pertinent part, as follows:  
 "§ 91.87(h) Operation at airports with operating control towers.

(h) Clearances required. No pilot may, at an airport with an operating control tower, taxi an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless he has received an appropriate clearance from ATC. A clearance to "taxi to" the runway is a clearance to cross all intersecting runways but is not a clearance to "taxi on" the assigned runway."

6/ Section 91.9 reads as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

landing aircraft has the right of way over a plane on the surface waiting to take off, and (c) a pilot, in the execution of his responsibilities as pilot-in-command, is not required to blindly follow ATC instructions particularly where (as in this instance) the instructions are unjustified and inconsistent with applicable regulations. 7/

The Administrator's appeal is twofold. First, he argues that the law judge erred in dismissing the allegation in the complaint that respondent, on April 13, 1976, operated N4971J when he did not hold a current and valid airman certificate. Second, the Administrator contends that the law judge's reduction of sanction is not warranted in view of the deliberate, reckless nature of respondent's violations in this case, considered together with his prior violation history.

Each party has also filed a reply brief opposing the appeal of the other party. 8/

Upon consideration of the briefs of the parties, and the entire record, the Board has determined that safety in air commerce or air transportation

7/ Respondent also requests oral argument. It does not appear, however, that oral argument would serve any useful purpose, and respondent's request therefor will be denied.

8/ In addition, the Administrator moved to dismiss part of respondent's appeal for failure to timely perfect such appeal and/or to strike part of respondent's reply brief. In order to assure a complete record and a full consideration of all issues on appeal, and in view of respondent's pro se status, the Administrator's motion will be denied.

and the public interest require affirmation of the Administrator's order of revocation. Except as modified with respect to sanction, we adopt the law judges findings as our own.

The evidence of record regarding the pilot identification issue is recounted in great detail in the initial decision (Tr. 1-191 to Tr. 1-199). The Administrator's case on this issue rested largely on the Assistant Manager of New Haven Airways who testified that, while he was working at the counter in his office at the airport at approximately 5:45 p.m., on September 22, 1975, he became aware, by listening to the tower frequency on his radio, that the tower had instructed an aircraft to go around; that he observed the plane continue its approach and land, and also observed it intermittently as it taxied toward the ramp; that as he observed the plane pulling up in front of New Haven Airway's hangar, he walked out to the plane to ask the pilot not to blast the hangar with propwash as he taxied out; and that he had a clear view of the pilot as he talked to him from a distance of about 10 feet for approximately 20 to 30 seconds.<sup>9/</sup>

Eight days later, on September 30, 1975, this witness went to Ithaca, New York, in the company of, and at the request of, a Federal Aviation Administration (FAA) representative who was familiar with respondent. They went to respondent's place of business, where the witness viewed a person, sitting in the front seat of an aircraft parked in a hangar (which thereafter was taxied out of the hangar), for a period of 1 or 2 minutes and from a distance of 30 to 40 feet. He positively

<sup>9/</sup> This witness also observed the last three digits on the aircraft registration number to be 71J.

identified the person he viewed at that time as the same person he saw in the pilot's seat of aircraft N4971J in New Haven on September 22. The FAA representative testified that the person seated in the plane at Ithaca on September 30, and identified by the New Haven Airway's Assistant Manager as the same person he saw 8 days earlier in N4971J in New Haven, was in fact respondent.

At the hearing, the New Haven Airways witness was unable to positively identify respondent either from a series of photographs or from a lineup of persons assembled in the hearing room. However, he did testify that one of the photographs, later identified as a picture of respondent,<sup>10/</sup> was the closest in the series to the person he observed in N4971J on September 22, 1975.

Respondent called as witnesses several employees of respondent's company (Chartair, Inc.) who testified that, despite the fact that the aircraft was owned by respondent, a number of pilots had access to the plane, and that the records of a particular flight do not necessarily reveal the identity of the pilot.<sup>11/</sup> Another witness (a line boy at Chartair) testified in effect that, from the vantage point described by the New Haven Airway's witness from which he viewed respondent at Ithaca on September 30, 1975, it would not have been possible to identify a person sitting in a plane as it emerged from the hangar.

<sup>10/</sup> Exhibit A-7 (a).

<sup>11/</sup> One of these witnesses (the General Manager of Chartair) stated that he had not checked the records to determine who was flying N4971J on September 22, 1975.

The law judge, after summarizing the pertinent evidence bearing on the identification issue and considering the demeanor and interest of the various witnesses, made a clear and unequivocal credibility finding in favor of the Administrator. Based thereon, the law judge concluded that the Administrator had established, by a preponderance of the substantial, reliable, and probative evidence, that respondent did operate N4971J on September 22, 1975, during the incident which provided the basis for the complaint.

We discern nothing in the record which would cause us to overturn the above finding, which rests largely on a credibility assessment within the exclusive province of the law judge who, as the trier of fact, is alone in a position to observe the demeanor of the witnesses. In our judgment, the process of identification utilized by the Administrator was reasonable under the circumstances, and there was no irregularity of a magnitude which would constitute grounds for invalidating the identification itself. Despite the New Haven Airway's witness' lack of certainty at the hearing regarding the photographs or the lineup of persons, which is understandable since the incident occurred a year earlier, the fact remains that this witness positively identified respondent 8 days after the incident as the pilot who landed N4971J at New Haven on September 22, 1975.

The circumstances surrounding the incident of September 22, 1975, are largely self-evident from the transcription of communications to and

from New Haven Local Control. <sup>12/</sup> After the pilot reported his position as 6 miles east of the field, N4971J was advised by the controller to report downwind for Runway 20. Approximately 1 1/2 minutes later, the following communications ensued: <sup>13/</sup>

1751:00	LC	Three five tango cleared for takeoff
:05	35T	Three five tango
:09	71J	Seven one jay's on a half mile final for two zero
:13	LC	Three five tango cancel takeoff clearance, one seven juliet go around
:21	71J	Well do you want us all to stop this is seven one jay
:25	LC	Seven one juliet go around
:30	616	Islip tower six zero six one six
:33	LC	Aircraft short final go around traffic on the runway
:37	71J	There is no traffic on the runway tower this is seven one jay we're passing by the traffic which is holding short of the runway we're gonna land
:44	LC	Seven one juliet you were instructed to go around do so right now
:52	LC	Three five tango position and hold please
:55	35T	Three five tango
:58	LC	OK seven one juliet turn right at the runway intersection give us a call at the telephone please at a

<sup>12/</sup> Exhibit A-5.

<sup>13/</sup> Id. p. 6-7.



1752:05 80R Eight zero romeo salty  
 :06 LC Eight zero romeo continue report a mile south  
 of the shoreline seven one juliet you have not  
 followed one single instruction give us a call on  
 the telephone when you get into New Haven Air-  
 ways three five tango cleared for takeoff

Three controllers who were on duty in the tower testified, in essence, that a portion of aircraft 35T was on the runway when 71J passed overhead; and that, instead of making a right turn at the runway intersection as instructed, 71J made a 180° turn on the runway and taxied back to a taxiway, where a left turnoff the runway was made. In addition, the pilot of 35T testified that he had proceeded beyond the hold line <sup>14/</sup> and that, when 71J passed overhead, the front part of his aircraft had passed the edge of the runway.

From the above, it is clear that respondent acted contrary to specific instructions from the tower by a) failing to report downwind, b) landing his aircraft, and c) making a 180° turn on the runway and departing via a taxiway. It should also be noted that the instruction to go around was given four separate times by the controller, yet respondent persisted with his approach and landing.

We can find nothing in the record which would excuse respondent from complying with the tower's instructions. Section 91.75(b) is explicit in providing that no person may, in an area in which air traffic control is

<sup>14/</sup> The hold line is approximately 75-100 feet from the edge of the runway and should not be passed until an aircraft is cleared to takeoff or cleared into position for takeoff.

exercised, operate an aircraft contrary to an ATC instruction, as is section 91.87(h) in providing that no pilot may, at an airport with an operating control tower, land an aircraft unless he has received an appropriate clearance from ATC. Respondent maintains that the actions of the pilot in this instance were authorized by sections 91.67(f) <sup>15/</sup> and 91.3(a) <sup>16/</sup> of the FAR. We do not agree. Those provisions are general in nature and, as a matter of common sense and a logical interpretation of operating rules as a whole, must give way to the specifics of sections 91.75 and 91.87. <sup>17/</sup> The latter provisions are an integral part of the ATC system, the purpose of which is to ensure separation of traffic. Adherence to ATC instructions on the part of pilots is essential to the effectiveness of this system. If pilots were free to disregard these instructions,

<sup>15/</sup> Section 91.67(f) provides, in pertinent part, as follows:  
 "§ 91.67 Right-of-way rules; except water operations.

" (f) Landing. Aircraft, while on final approach to land, or while landing, have the right of way over other aircraft in flight or operating on the surface. When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right of way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land, or to overtake that aircraft."

<sup>16/</sup> Section 91.3(a) provides, in pertinent part, as follows:  
 "§ 91.3 Responsibility and authority of the pilot in command.  
 (a) The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft."

<sup>17/</sup> Thus, section 91.67(f) obviously has greater application to operations at uncontrolled fields, where there is no tower to provide traffic separation and pilots must rely on the right-of-way rules and on their own ability to see and avoid other aircraft.

and to land without a clearance, totally unacceptable elements of uncertainty and disorder would be introduced into the system. <sup>18/</sup>

Furthermore, there were no actions on the part of the controllers which could be found to justify respondent's conduct. Neither the handling of other aircraft, nor the communications with respondent subsequent to the incident, have any bearing on the incident and provide no justification for respondent's actions. <sup>19/</sup> The record does not indicate any form of emergency which might be said to excuse respondent's failure to comply with ATC instructions. Rather, it appears that he had made his mind up to land the aircraft and no amount of instruction from the tower to the contrary could keep him from that goal.

In view of the foregoing, it is our conclusion that the evidence of record clearly establishes violations of sections 91.75(b) and 91.87(h)

<sup>18/</sup> Respondent cites in his brief several judicial decisions, rendered in aircraft accident litigation, to support the general proposition that the pilot is responsible for the safe operation of the aircraft. We do not argue with that proposition, nor find it inconsistent with our decision herein. However, that responsibility does not give the pilot the right to disregard ATC instructions designed to separate traffic and thus enhance safety.

<sup>19/</sup> Respondent faults the controllers for failing to maintain proper vigilance so as to sight N4971J at an earlier point. The controllers, in testimony accepted by the law judge, stated that N4971J appeared to pop out from behind a hill in the approach area. In any event, it appears that respondent's failure to report downwind was more instrumental in the controller's inability to sight N4971J at an earlier point than any lack of vigilance on the part of the controllers.

of the FAR. It is our further conclusion that a violation of section 91.9 was established. The law judge accurately characterized respondent's operation of the plane as "reckless." Moreover, this operation created a conflict with aircraft 35T which was in turn a form of endangerment, potential at the very least and clearly within the intent of section 91.9.

The charge that, when respondent operated the aircraft during the incident described above, he did not hold a current and valid airman certificate is based on the following circumstances. An order of the Administrator suspending respondent's certificate, following an appeal to the Board (Docket SE-1469), was ultimately upheld by the U.S. Court of Appeals for the D.C. Circuit in August of 1973. The record indicates that respondent never surrendered his certificate pursuant to this order, despite the fact that the Administrator's counsel sent to respondent a certified letter, dated September 10, 1974, directing respondent to surrender his certificate and stating that until the certificate is surrendered and the period of suspension served respondent would not hold a valid airman certificate. <sup>20/</sup> Although respondent surrendered his certificate to the FAA in 1974, that surrender was pursuant to order upheld by the court in an entirely separate proceeding, (Docket SE-1618) suspending respondent's

<sup>20/</sup> Exhibit A-10. The return receipt attached to this exhibit indicates the letter was received at respondent's offices.

certificate for 60 days. The 60-day period of surrender in 1974 cannot be found to have also satisfied the 45-day period of suspension ordered in Docket 1469. Consequently, respondent's failure to surrender his certificate pursuant to the latter proceeding, and his operation of an aircraft on September 22, 1975, constitute a violation of sections 61.3(a) and 61.19(f) <sup>21/</sup>

The Administrator also charged in the complaint that respondent violated sections 61.3(a) and 61.19(f) on a separate occasion by operating N4971J on a flight which landed at Syracuse, New York, on April 13, 1976. The Administrator's case was based exclusively on the testimony of counsel who stated that he had arranged to meet respondent in Syracuse at the ATC office at the airport at 2:00 p.m., on April 13, 1976; that after he had arrived at about 1:45 p.m., the ATC chief received word that respondent had radioed in that he was on his way from Ithaca; and that at approximately 2:00 p.m., he observed respondent taxi N4971J up to the front of the building and park the aircraft. The law judge, noting that the respondent was only observed taxiing the aircraft in the vicinity of the office building, found as follows:

"I feel that the evidence is just too ambiguous. The burden of proof in this proceeding . . . rests with the Administrator and the evidence here is just not sufficient for me to draw the inference as being most probable on this to the exclusion of any other inference that the respondent in fact operated 71 Juliette as pilot in command from Ithaca to Syracuse on that day." (Tr. 1-160).

<sup>21/</sup> At the same time, it is our view that the Administrator, upon failure of respondent to respond to the letter directing him to surrender his certificate, should have taken further steps, such as sending a representative to respondent to collect the certificate or, if necessary, resorting to court action to obtain the certificate. Any lack of diligence of the Administrator's part, however, by no means excuses respondent's failure to surrender.

While we look on this as a close question, the law judge's weighing of the evidence appears reasonable and therefore will not be disturbed.

Finally, with respect to sanction, the record of certificate actions taken against respondent may be summarized as follows:

1. By order of the Administrator dated July 29, 1969, respondent's certificate was suspended for 15 days for violations of section 91.75(b), 91.87(h) and 91.9 of the FAR.
  2. By order of the Administrator dated October 16, 1970, respondent's certificate was suspended for 45 days for violations of section 91.87(h) and 91.9 of the FAR.
  3. By order of the Administrator dated July 20, 1971, respondent's airman's certificate was suspended for 120 days for a violation of section 91.170 of the FAR (operating aircraft when the altimeter and static system has not been tested and inspected).
- All three of these orders were affirmed by the Board, with the only modification being a reduction in sanction to a 60-day suspension in the third case, and also upheld by the U.S. Court of Appeals.

The first two of the above cases involved the disregard of ATC instructions and the taking of actions (e.g., taking off an aircraft) without first obtaining the requisite ATC clearance. The substantially identical violations herein indicate both a continuing disdain for the ATC system on respondent's part and the ineffectiveness of the prior suspensions as a deterrent to such

conduct. The instant case also includes the entirely separate and serious violation involving the operation of an aircraft by respondent at a time when his certificate was under suspension. Considering the record herein, in light of respondent's prior violation history, it is our conclusion that respondent, by his continuing and flagrant disregard of the regulations, has demonstrated that he lacks the care, judgment and responsibility required of the holder of an airman certificate. It therefore follows that he is unqualified to hold said certificate, which is subject to revocation.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal be and it hereby is denied;
2. The Administrator's appeal be and it hereby is granted, in part;
3. The Administrator's order, as modified, be and it hereby is

affirmed; and

4. The revocation of respondent's commercial pilot certificate shall commence 30 days after service of this order. <sup>22/</sup>

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above opinion and order.

<sup>22/</sup> For purposes of this order, the respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to section 61.19(f) FAR.

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 23rd day of June 1977.

QUENTIN S. TAYLOR, Acting  
Administrator, Federal Aviation  
Administration,

Complainant,

v.

ALLEN W. HAYES,

Respondent.

Docket SE-3284

ORDER DENYING PETITION FOR  
RECONSIDERATION

Respondent has filed a petition for reconsideration of NTSB Order EA-980, served March 31, 1977, whereby the Safety Board affirmed the revocation of respondent's commercial pilot certificate. Respondent's petition is based on the contention that the Board erred in the following respects: (1) by improperly weighing crucial record evidence concerning the identification of respondent as the pilot of the aircraft in question; (2) by failing to strictly construe the regulations respondent was charged with violating; and (3) by relying, in aggravation of sanction, on prior cases involving respondent which were disposed of on procedural grounds.

The Administrator has filed a reply urging that the petition be denied.

We have carefully reviewed the evidence of record concerning the pilot identification issue, in light of respondent's petition, and have found nothing which would cause us to alter our conclusion, expressed in Order EA-980, that the Administrator established by a preponderance of the evidence that respondent operated aircraft



N4471J on the flight which became the subject of the Administrator's complaint. Although the respective testimony of the identifying witness and the FAA representative can be read to reflect a possible disparity as to which seat respondent was in during the identification at Ithaca subsequent to the incident, <sup>1/</sup> the FAA representative clearly testified that the person identified on that occasion, as the pilot during the incident, was in fact respondent.

Respondent's second argument is deficient on its face in that he does not specify the manner in which the Board failed to strictly construe the regulations he was found to have violated. We have nevertheless reviewed the record and confirmed that these regulations clearly apply to the actions of respondent established by the record.

Finally, we are unaware of any precedent which holds that enforcement cases which are disposed of on procedural grounds cannot be considered in regard to sanction in future cases involving the same airman.<sup>2/</sup> Respondent has presented nothing which would dissuade us from our conclusion that the violations established herein, considered

<sup>1/</sup> The testimony on this point is vague. The identifying witness at one point stated that he did not remember which side respondent was on (Tr. 96), at another point that he believed respondent was in the pilot's seat but that he could not be sure (Tr. 97), and at a third point that, although he was not positive, he believed respondent was in the co-pilot seat (Tr. 323-4). The FAA representative testified that respondent was sitting "on the left side" (Tr. 195).

<sup>2/</sup> The principal case cited by respondent (Administrator v. Rivera, 1 N.T.S. B. 995 (1970)) does not stand for the above proposition, but rather is an example of a decision in which the Board chose not to dispose of a case on a procedural ground. Two of the three cases comprising respondent's prior violations were disposed of on procedural grounds, but under circumstances which were distinguishable from Rivera and which were affirmed by U.S. Courts of Appeals. Obviously, respondent cannot re-litigate those prior cases herein.

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 25th day of July 1977.

LANGHORNE M. BOND,  
Administrator, Federal Aviation  
Administration,

Complainant,

v.

Docket SE-3284

ALLEN W. HAYES,

Respondent.

ORDER DENYING REQUEST FOR STAY

Respondent has requested a stay, pending judicial review, of the effective date of the revocation of his commercial pilot certificate ordered as a result of this proceeding. <sup>1/</sup> The Administrator opposes the requested stay.

As a general matter, the Board grants requests for a stay of the effective date of a sanction until such time as the Court of Appeals

<sup>1/</sup> Order EA-980, March 31, 1977; reconsideration denied, Order EA-1028, served June 28, 1977. Respondent, in the letter requesting the stay, also argues that Order EA-1028 is in error. These arguments will not be considered herein inasmuch as the Board's Rules of Practice (49 CFR Part 821) do not provide for any further pleadings beyond a petition for reconsideration, which was denied by Order EA-1028.

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in conjunction with respondent's prior violation history, warrant the sanction of revocation.

In sum, the petition contains no matter which would justify modification of Order EA-980 in any way.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's petition for reconsideration be and it hereby is denied.

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above order.

NOT TO BE PUBLISHED - SEE LOCAL RULE 8 (f)

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1759

September Term, 19 76

Allen W. Hayes,  
Petitioner

United States Court of Appeals  
for the District of Columbia Circuit

v.

FILED JAN 26 1979

National Transportation Safety  
Board and Langhorne M. Bond,  
Administrator, Federal Aviation  
Administration,  
Respondents

GEORGE A. FISHER  
CLERK

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL TRANSPORTATION  
SAFETY BOARD

BEFORE: WRIGHT, Chief Judge, ROBINSON and ROBB, Circuit  
Judges

## J U D G M E N T

This cause came on to be heard on a petition for review of an order of the National Transportation Safety Board, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the National Transportation Safety Board under review herein is hereby affirmed.

Per Curiam

For the Court:

*George A. Fisher*

GEORGE A. FISHER  
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

completes the process of judicial review. These stays, however, have been invariably granted in cases where the sanction imposed has been a suspension of the pilot's certificate. In the instant case, on the other hand, the sanction ordered was revocation which, unlike a suspension, is based directly on a finding of lack of qualifications. Specifically, the Board concluded, ultimately, as follows:

"Considering the record herein, in light of respondent's prior violation history, it is our conclusion that respondent, by his continuing and flagrant disregard of the regulations, has demonstrated that he lacks the care, judgment, and responsibility required of the holder of an airman certificate" (Order EA-980, page 16).

Respondent's prior violation history consists of three cases in which suspensions were imposed. All three of the Board's decisions were upheld by the Court of Appeals. Two of these three cases, like the instant proceeding, involved the disregard of ATC instructions and the taking of actions without first obtaining the requisite ATC clearance.

The circumstances herein are strikingly similar to those in Administrator v. Metro Air Systems, Inc., Order EA-918, November 4, 1976, wherein the Board denied a request for a stay of the revocation of the certificate of a respondent which had a history of three prior cases, involving suspensions based on similar violations and which were all upheld by the Court of Appeals. The instant case (Docket SE-3284) contains the additional element that, in one of the three prior cases, respondent failed to surrender his certificate after the Board's decision was upheld judicially, and thereafter operated an aircraft without a valid and current certificate.

In view of the history of respondent before this Board and before the Court of Appeals, it is our conclusion that a stay of the sanction herein would not be consistent with the public interest or with precedent.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's request for a stay of sanction pending judicial review be and it hereby is denied.

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above order.